

OCT 22 2018

SPECIAL NOTICE LETTER
INFORMATION REQUEST LETTER

URGENT LEGAL MATTER -- PROMPT REPLY NECESSARY
SENT BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Carl R. Ice
President and Chief Executive Officer
BNSF Railway and Burlington Northern Santa Fe, LLC
2500 Lou Menk Drive
P.O. Box 961039
Ft. Worth, Texas 76161-0039

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Superfund

0408

10/22/18

The Corporation Trust Company
Registered Agent for BNSF Railway Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801

Re: Cherokee County Superfund Site - Record of Decision, Operable Unit #8, Railroads Cleanup
Special Notice for Negotiation of Remedial Design and Request for Information

Dear Mr. Ice:

This letter notifies you of your potential responsibility under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA or Superfund, 42 U.S.C. § 9607(a), for the cleanup of the Cherokee County Superfund Site, OU8 Railroads, or CCR OU8. The U.S. Environmental Protection Agency is now contacting you to begin discussions to resolve the responsibility of BNSF Railway and Burlington Northern Santa Fe, LLC, for the cleanup associated with the OU8 railroad remedial action at the Cherokee County Site, or Site.

Specifically, the EPA invites you to accelerate the remedial design for CCR OU8 by offering you, as a potentially responsible party, an opportunity to submit a good faith offer to conduct remedial design, or RD, under an Administrative Settlement. This offer to negotiate an RD settlement necessitates issuance of two settlement documents: an Administrative Settlement/Administrative Order on Consent, or AS/AOC, for RD and a subsequent consent decree for the remedial action. The Record of Decision, or ROD, for OU8 was issued in 2016. The major components of the remedy include the following:

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for Gunn
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LMSE

Gunn

Gunn
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- Excavation and removal of all ballast material and contaminated soil with metals concentrations exceeding the cleanup levels of 1,770 parts per million, or ppm, lead and 4,000 ppm zinc;
- Transportation of wastes to existing consolidation areas for consolidation and capping (OU3/OU4);
- Institutional controls, or ICs, placed at consolidation areas so that the consolidation areas are not disturbed and
- Operation and maintenance, or O&M, provided at the consolidation areas.

The remedial design is scheduled to begin in 2019. The agency believes that bifurcation of the RD and the remedial action, or RA, is appropriate to accelerate the implementation of response actions at CCR OU8. A mixed work settlement may be appropriate because the cleanup work for abandoned rail corridors could be completed by the EPA, while BSNF would be responsible for cleanup of its own rail corridors. The implementation of the RD work would be in a manner to avoid delays in initiating the RA. The EPA also anticipates RA settlement negotiations with BSNF would begin no later than at the completion of the RD.

Also, this letter requests information from BSNF under the authority of Section 104(e) of CERCLA. The agency is requesting your cooperation in providing information and documents relating to the contamination and CCR OU8. (See Enclosure A, Information Request Instructions and Questions.)

Background

The EPA has documented the release or threatened release of hazardous substances, pollutants, or contaminants at the Site. The EPA placed the Site on the National Priorities List, or NPL, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658. Mining operations contaminated soils, groundwater and surface water at this 115-square-mile Superfund Site with lead, zinc and cadmium. The EPA divided the Site into Subsites and nine operable units, or OUs, including OU8 Railroads. The BSNF rail corridors are included in the CCR OU8 remedy (herein “the BSNF rail corridors”). For example, one of the BSNF rail corridors is located at or near the station of Riverton, County of Cherokee, State of Kansas. (See Enclosure B, BSNF Rail Map, Drawing No. 70413B.)

The EPA has undertaken response actions and incurred costs at the Site. Subsequent to the NPL listing, the EPA has conducted a number of investigations throughout the Site, beginning with the Galena subsite in 1985. Numerous remedial and removal actions have taken place throughout the Site as noted in RODs and Five-Year Reviews for the various OUs. (See link to CCR OU8 ROD and other RODS and Five-Year Reviews at this Site’s homepage: <https://www.epa.gov/superfund/chokeecounty>.)

The EPA identified and designated CCR OU8 in 2012. Work at this operable unit has consisted of the remedial investigation, or RI, that began in 2013. Sampling was conducted in 2013 during three separate events including samples from the BSNF railroad corridors. Following completion of the RI, the feasibility study, or FS, began in 2015. A Streamlined Ecological Risk Assessment was conducted in 2014 and the Baseline Human Health Risk Assessment was completed in 2015. These CCR OU8 response activities are the first investigations and studies focused solely on risks associated with rail lines at this Site. There have been a few railroad beds incidentally included with the undeveloped areas in other OUs at this Site, e.g., the mining districts, subsites and other areas.

The EPA obtained access to the BNSF rail corridors for sampling events as part of the CCR OU8 RI/FS. The agency appreciates the cooperation of BNSF during these sampling events. Other property access was obtained through access agreements signed by the property owner (for abandoned segments that reverted to private ownership). Access for BNSF-owned rail lines was coordinated through your contractor at Jones Lang LaSalle America, Inc.

Special Notice and Negotiation Moratorium

The EPA has determined that use of the special notice procedures set forth in Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), may facilitate a settlement between BNSF and the EPA for implementation of the RD for CCR OU8 response actions. Under Section 122(e), this letter triggers a 60-day moratorium on certain EPA response activities at the Site. During this 60-day moratorium, the EPA will not begin RD/RA at the BNSF rail corridors at the Site. However, the EPA reserves the right to take action at the Site at any time should a significant threat to human health or the environment arise.

During this 60-day period, BNSF is invited to participate in formal negotiations with the EPA in an effort to reach a settlement to conduct or finance the remedial design for the BNSF rail corridors within this Site. The 60-day negotiation period ends on **[insert date]**. The 60-day negotiation moratorium will be extended for an additional 60 days if BNSF provides the EPA with a “good faith offer” to conduct or finance the response action. If the EPA determines that your proposal is not a “good faith offer,” you will be notified in writing of the EPA’s decision to end the moratorium. If the moratorium is extended for an additional 60 days, negotiations will conclude on **[insert date]**. If settlement is reached between the EPA and the potentially responsible parties, or PRPs, within the 120-day negotiation moratorium, the settlement will be embodied in an AS/AOC for RD. (See Enclosure C, Proposed AS/AOC for RD and Proposed Statement of Work for CCR OU8.) When approved by the EPA and, as necessary and in accordance with the law and guidance on Attorney General approvals, the U.S. Department of Justice, or DOJ, the AS/AOC for RD will be filed with the Region 7 EPA Regional Hearing Clerk and with the Administrative Record for this Site.

If a “good faith offer” is not received within 60 days, or a timely settlement cannot be reached, the EPA may take appropriate action at the Site, which may include either of the following options: (1) the EPA may fund the RD/RA and pursue a cost recovery claim under Section 107 of CERCLA, 42 U.S.C. § 9607, against BNSF; or (2) the EPA may issue a Unilateral Administrative Order, or UAO, to BNSF under Section 106(a) of CERCLA, 42 U.S.C. § 9606, requiring BNSF to perform the work described in the ROD. If the recipients of a UAO refuse to comply with the UAO, the EPA may pursue civil litigation against the recipients to require compliance.

Good Faith Offer

A proposed AS/AOC for RD is enclosed to assist you in developing a “good faith offer.”¹ As indicated, the 60-day negotiation moratorium triggered by this letter is extended for 60 days if the PRPs submit a “good faith offer” to the EPA. A “good faith offer” to conduct or finance the remedial action is a written proposal that demonstrates your qualifications and willingness to perform such work and includes the following elements:

¹ This draft AS/AOC is not currently binding on the EPA and is subject to revision and approval by the EPA and DOJ, as necessary in accordance with the law and guidance. EPA Headquarters and DOJ approval may be necessary in this matter. It is based on the model AS/AOC for RD, which is available at <https://www.epa.gov/tx/administrative-settlement-agreement-and-order-consent-remedial-design>.

- A statement of your willingness and financial ability to implement the requirements of the ROD and proposed AS/AOC for RD, and that provides a sufficient basis for further negotiation;
- A demonstration of your technical capability to carry out the remedial design, including identification of the firm(s) that may actually conduct the work or a description of the process that will be undertaken to select the firm(s);
- A detailed statement of work or work plan identifying how you intend to proceed with the remedial design, including your willingness to design a “greener cleanup” as described in the EPA’s guidance on “Consideration of Greener Cleanup Activities in the Superfund Cleanup Process” (2016); <https://semspub.epa.gov/work/HQ/100000160.pdf> ;
- A statement of your willingness to reimburse the EPA for costs the EPA will incur in overseeing your implementation of the remedial design;
- A response to the proposed AS/AOC for RD. If your offer contemplates modifications, please make revisions or edits and submit a version showing your proposed modifications to it; e.g., a redline/strikeout version of the proposed AS/AOC for RD in Microsoft Word, and;
- The name, address, and phone number of the party who will represent you in negotiations.

Demand for Reimbursement of Costs

With this letter, the EPA demands that you reimburse the EPA for its costs incurred to-date and encourages you to voluntarily negotiate an AS/AOC for RD in which you agree to perform the RD.

In accordance with Section 104 of CERCLA, 42 U.S.C. § 9604, the EPA has already taken certain response actions and incurred certain costs in response to conditions at the Site. These response actions include: RI/FS and ROD for CCR OU8. The EPA is seeking to recover from BNSF its response costs and all the interest authorized to be recovered under Section 107(a) of CERCLA, 42 U.S.C. § 9607. To date, the approximate total response costs for CCR OU8 identified through May 31, 2018, for the Site are \$843,472.92. Under Section 107(a) of CERCLA, the EPA hereby makes a demand for payment from BSNF for the above amount plus all interest authorized to be recovered under Section 107(a). A summary of these costs is enclosed as Enclosure D.

Some, or all, of the costs associated with this notice may be covered by current or past insurance policies issued to BNSF. Most insurance policies will require that you timely notify your carrier(s) of a claim against you. To evaluate whether you should notify your insurance carrier(s) of this demand, you may wish to review current and past policies, beginning with the date of BNSF’s first interaction with this Site, up to the present. Coverage depends on many factors, such as the language of the particular policy and state law.

In the event that you file for protection in a bankruptcy court, you must include the EPA as a creditor, because the EPA has a potential claim against you. The EPA reserves the right to file a proof of claim or application for reimbursement of administrative expenses.

Administrative Record

In accordance with Section 113 of CERCLA, 42 U.S.C. § 9613, the EPA has established an Administrative Record containing the documents that serve as the basis for the EPA's selection of the response action for the Site. This Administrative Record is located at <https://www.epa.gov/superfund/chokecounty> and is available to the public for inspection and comment. The Administrative Record is also available for inspection and comment at the Superfund Records Center, EPA Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. You may wish to review the Administrative Record to assist you in responding to this letter, but your review should not delay such response beyond the 60-day period provided by CERCLA.

EPA Contact Person for Special Notice Response and Good Faith Offer

You are encouraged to contact the EPA by **[insert date]** to indicate your willingness to participate in future negotiations concerning this Site. If the EPA does not receive a timely response, the EPA will assume that you do not wish to negotiate a resolution of your responsibilities for conducting the RD for CCR OU8 in connection with the Site, and that you have declined any involvement in performing such response activities.

Your response to this Special Notice Letter and the demand for costs included herein, including written proposals to perform the RD for CCR OU8 at this Site, should be sent to:

Elizabeth Hagenmaier
Remedial Project Manager
Superfund Division, Lead Mining and Special Emphasis Branch
US EPA Region 7
11201 Renner Blvd.
Lenexa, KS 66219
(913) 551-7939

The factual and legal discussions in this letter are intended solely to provide notice and information, and such discussions are not to be construed as a final EPA position on any matter set forth herein. Due to the seriousness of the environmental and legal problems posed by the conditions at the Site, the EPA urges that you give immediate attention and prompt response to this letter.

Information Request

The EPA is seeking information from BNSF concerning the management, generation, storage, treatment, transportation, and disposal methods related to hazardous materials or substances that have been or threaten to be released from CCR OU8. (See Enclosure A for instructions and questions.) The EPA believes that you might have information which may assist the agency in its response at the Site. Under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e)(2), the EPA has broad information-gathering authority which allows the EPA to require persons to furnish information or documents relating to:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility;

(B) The nature or extent of a release or threatened release of hazardous substance or pollutant or contaminant at or from a vessel or facility;

(C) Information relating to the ability of a person to pay for or to perform a cleanup.

While the EPA seeks your voluntary cooperation in this investigation, compliance with our request for information is required by law. Failure to respond fully and truthfully to the attached Information Request **within thirty (30) days of receipt of this letter**, or to adequately justify such failure to respond, may result in an enforcement action by the EPA pursuant to Section 104(e) of CERCLA. The provision of false, fictitious, or fraudulent statements or representations may subject you to criminal penalties under 18 U.S.C. § 1001.

Some of the information the EPA is requesting may be considered confidential. Please be aware that BNSF may not withhold the information upon that basis. If BNSF wishes the EPA to treat the information confidentially, BNSF must advise the EPA of that fact by following the procedures outlined in the attached Information Request, including the requirement for supporting the claim for confidentiality.

If you have information about other parties who may have information which may assist the agency in its investigation of the Site or may be responsible for the contamination at the Site, that information must be submitted within the time frame noted above.

This Information Request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* Your response to this Information Request should be mailed within 30 days of receipt of this letter to:

U.S. Environmental Protection Agency
c/o Elizabeth Hagenmaier
Remedial Project Manager
Lead Mining and Special Emphasis Branch
11201 Renner Blvd.
Lenexa, Kansas 66219

If you have any questions regarding the technical aspects of this letter, please contact Elizabeth Hagenmaier, Remedial Project Manager, at (913) 551-7939 and hagenmaier.elizabeth@epa.gov. If you have an attorney handling your legal matters, please direct his or her questions to Jane Kloeckner, Site Attorney, at (913) 551-7235. If you have any other questions regarding this letter, you may contact Gene Gunn, Chief of the Lead Mining and Special Emphasis Branch, at (913) 551-7776 and gunn.gene@epa.gov.

My staff and I look forward to working with you during the coming months.

Sincerely,

Mary P. Peterson
Director
Superfund Division

cc: Chris Hase, Kansas Department of Health and Environment
Jeffrey N. Davis, BNSF Railway

Enclosures

- A. Information Request Instructions and Questions
- B. BNSF Rail Maps
- C. Proposed AS/AOC for RD for OU8 Cherokee County Site, Rail Road Cleanup
- D. CCR OU8 Past Cost Summary